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No. 87-744

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARMCO INC.,

Petitioner,

—v.—

THE MARYLAND CASUALTY COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED

Whether the decision of the Court of Appeals for the Fourth Circuit conflicts with the policy of Congress to create a uniform, national framework for the clean-up of toxic wastes, under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9601, *et. seq.*, by finding a wholly artificial distinction between actions by the Government under CERCLA Sections 107(a)(4)(A) and (B) on the one hand and Section 107(a)(4)(C) on the other, to support its holding that an insurer is not liable to defend or indemnify its insured under a policy containing standard comprehensive general liability ("CGL") provisions in an action for clean-up costs under CERCLA Sections 107(a)(4)(A) and (B).

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STATEMENT OF THE CASE

In the Brief in Opposition submitted by Respondent, The Maryland Casualty Company ("Maryland Casualty"), it characterizes the insurance agreement between itself and Armco Inc. ("Armco") as "handcrafted," thus attempting to create the impression that the language of the insurance policy clause at issue here is a unique provision specially negotiated between the parties to the contract. The policy language in fact is not a provision unique to Armco's general liability policy, but rather is standard form insurance policy language used throughout the liability insurance industry.

ARGUMENT

In its Brief in Opposition, the Respondent characterizes the issue before this Court as strictly a matter of state contract law and, therefore, not appropriate for this Court's consideration under the standards enunciated in Rule 17 of the Supreme Court Rules. Even a cursory reading of the opinion of the Court of Appeals for the Fourth Circuit and the opinion of the district court reveals that neither decision was based on any peculiarity of Maryland law. In fact, neither decision below identifies any Maryland insurance law precedent as controlling the outcome of the case,[1] nor does

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[1]The district court cited Maryland cases for its holding on choice of law, A-2, and for some general rules of construction, A-3. Likewise, the Court of Appeals for the Fourth Circuit cited a Maryland case for the proposition that an insurance policy is to be construed according to the meaning a reasonably prudent lay person would infer, A-16. The only Maryland law case upon which either lower court substantively relied is a federal district court decision, *Haines v. St. Paul Fire and Marine Insurance Company*, 428 F. Supp. 435 (D. Md. 1977), which, as was noted in Armco's Petition, is irrelevant to the issue here. (Insured claimed coverage under a professional liability policy for defense and indemnity in suit brought by the Securities and Exchange Commission against the insured to force disgorgement of illegal profits). References to the opinions of the court of appeals and the district court, reprinted in the Appendix to the Petition, are indicated by "A- ".

the Respondent's Brief in Opposition point to any decision of the Court of Appeals of Maryland as controlling. Instead, what is apparent from the opinions of the courts below and every brief filed by Respondent to date is that the courts below have decided the question of whether response costs are considered "damages" under the standard form CGL policy as a matter of general contract and insurance law.[2]

In its struggle to force this case into the mold of a simple question of state law, Respondent harkens back to the law-equity distinction which it urged on the district court and then abandoned in the court of appeals. *See* Respondent's Brief in Opposition ("Opposition") at 13 ("[other cases] support the findings, expressed by the district court, that '[b]lack letter insurance law holds that claims for equitable relief are not claims for 'damages' under liability insurance contracts.'") The Fourth Circuit characterized that distinction as "irrelevant" to the question to be decided and, instead, turned its attention to policy considerations such as whether response costs would be more or less than the loss in value to the property, and the necessity for certainty and economy in the insurance industry. (A-18 to A-20).

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[2]Maryland Casualty's claim that even if the Eighth Circuit were to reinstate the decision of the panel in *Continental Insurance Companies v. North Eastern Pharmaceutical and Chemical Company, ("NEPACCO II")*, 811 F.2d 1180, *pet. for reh'g en banc granted*, 815 F.2d 51 (8th Cir. 1987), the result would only be conflicting courts of appeals' decisions based upon differing interpretations of the laws of two states is equally unavailing given the clear reliance of the panel in the Eighth Circuit upon the decisions of other jurisdictions, rather than any peculiarity of Missouri state law. *See NEPACCO II*, 811 F.2d at 1186–87, *citing Lansco Inc. v. Department of Environmental Protection*, 138 N.J. Super. 275, 350 A.2d 520, 524–25 (1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (1976), *cert. denied*, 73 N.J. 57, 372 A.2d 322 (1977); *Port of Portland v. Water Quality Insurance*, 549 F.2d 233, 235 (D. Ore. 1982); *Mraz v. American Universal Insurance Company*, 616 F.2d 1173 (D. Md. 1985), *rev'd*, 804 F.2d 1325 (1987); *Kutsher's Country Club v. Lincoln Insurance Company*, 119 Misc. 2d 889, 465 N.Y.S.2d 136, 139 (N.Y. Sup. Ct. 1983).

Armco's Petition for Certiorari presents an important federal question which is not dependent upon any particular issue of state law. Response costs are one of the principal forms of relief provided for by Congress in CERCLA, the federal toxic waste site clean-up statute. The insurance consequences which follow a claim for response costs are of crucial importance in effectuating the federal policies underlying CERCLA. This Court has recognized that there are certain kinds of issues in which the "federal interest is so strong that they should be resolved on the basis of a uniform judge-made federal law, rather than on the basis of varying state law." Wright, Miller & Cooper, *Federal Practice and Procedure* §§3563, 4514 (1982 & 1987 Supp.). Since *Erie Rail Co. v. Tompkins*, 304 U.S. 64 (1938), it has been settled that there is no "*general* federal common law" in diversity actions, but it is equally clear that in certain specific circumstances federal courts have fashioned general rules in the interest of upholding a federal policy embodied in a federal statute. *See, e.g., Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Texas Industries Inc. v. Radcliff Materials Inc.*, 451 U.S. 630 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981); *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1965). In *Wallis*, this Court noted that:

> In deciding whether rules of federal law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown.

384 U.S. at 68. In such circumstances, the federal statute is the "prime repository of federal policy" and the starting point for elaborating a uniform national rule as a matter of federal common law. 384 U.S. at 69.

It is inevitable that allowing the rule enunciated by the court of appeals to stand will frustrate the important federal environmental policies embodied in CERCLA. To suggest

otherwise, as Maryland Casualty has in its Opposition, is to ignore the obvious.

The legislative history makes clear that Congress intended for clean-up under CERCLA to be performed promptly, without the delay of first establishing liability. As a practical matter, site operator defendants and generator defendants will be far less likely to cooperate in remedial efforts if their general liability insurance coverage is not available to defray the costs involved in remedying a CERCLA site. The essence of insurance is the trade-off of a certain loss in the form of a premium for certain coverage of a future loss which may or may not occur. If coverage is uncertain, the time lost in resolving that uncertainty will undoubtedly impact the primary objective of CERCLA—the clean-up and restoration of a hazardous waste site that presents an imminent public danger. The question of whether CERCLA response costs constitute "damages" for purposes of comprehensive general liability insurance presents an issue which is more appropriately resolved by the fashioning of a uniform national standard. *See Banco Nacional*, 376 U.S. at 426 (federal rule of decision is "necessary to protect uniquely federal interests"). Respondent has advanced no reason for having insurance coverage issues under CERCLA determined by the vagaries of state common law. This case proves the point. A CERCLA site in Missouri should be remedied under the same principles as one in Maryland. Those principles are matters of federal law.

Respondent also makes the unsupportable claim that the conclusion that response costs are equitable relief has been "reached by *every* court to consider the question." Opposi-

tion at 16 (emphasis in original).[3] Respondent entirely ignores the line of cases cited in the Petition holding that response costs in a variety of federal and state environmental clean up statutes are considered "damages" for purposes of a CGL policy. Petition at 13–15.

Finally, Respondent argues that in seeking coverage for CERCLA response costs, Armco is "ignoring the principal relief sought in the underlying complaint," namely, an injunction under Section 106 of CERCLA, 42 U.S.C. §9606, and is instead "focus[ing] on the periphery." Opposition at 15. Without addressing the issue of injunctive relief sought under Section 106 of CERCLA, the implication that Armco's claim for indemnity for response costs under Section 107 and the cost of defense is somehow defeated because the government's complaint for response costs is "on the periphery" of the action is altogether irrelevant. The only claim for indemnity and cost of defense asserted by Armco in this case has been for response costs under Section 107 of CERCLA, and the costs of defending the government's suit in the underlying litigation.[4] Respondent's liability in this case should be determined on the claims for which coverage was sought.

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[3]Respondent cites a line of cases which address the CERCLA response costs issue in the context of whether a generator or site operator defendant has a right to jury trial under the Seventh Amendment to the United States Constitution. Opposition at 16 n.24. These cases cannot dispose of the issue. Whether response costs are a form of remedy which invokes the right to a jury trial under Seventh Amendment analysis is a unique and narrowly circumscribed issue. There is no reason why an analysis of the constitutional right should govern the inquiry into rights and duties or payment of response costs under a CGL policy.

[4]It is black letter insurance law that the duty to defend exceeds the duty to indemnify in two ways: first, the duty to defend is invoked if the complaint on its face makes a claim for damages which would be covered under the policy, even if that claim turns out ultimately to be frivolous or unsupported, *Western World Insurance Co., Inc. v. Hartford Mutual Insurance Co.*, 784 F.2d 558 (4th Cir. 1986), and, second, if only one count of a multi-count suit states a claim for damages which would be covered under the policy, the insurer is obliged to defend the entire suit. *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 347 A.2d 842 (1975).

CONCLUSION

For the foregoing reasons, Armco Inc. respectfully asks that this Court grant its Petition for Certiorari and set the case for briefing and oral argument.

Respectfully submitted,

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